Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	FCC 13-122
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	WT Docket No. 13-238
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	WC Docket No. 11-59
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	RM-11688 (terminated)
2012 Biennial Review of Telecommunications Regulations	WT Docket No. 13-32

COMMENTS OF FAIRFAX COUNTY, VIRGINIA

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The County of Fairfax, Virginia, ("County" or "Fairfax County") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC") on September 26, 2013. The NPRM sets forth a myriad of proposed rules designed to give further guidance to localities and the telecommunications industry regarding a recently enacted statute, § 6409(a) of the Middle Class Tax Relief Act ("§ 6409(a)"). This statute provides that in limited circumstances – when a modification to an existing telecommunications tower or base station does not substantially change the physical dimensions of those structures – localities and state governments must approve those modifications. [1]

Despite this directive, which is expressly limited to collocations on existing wireless towers and base stations, the FCC is contemplating a variety of rules that would further constrain the ability of local governments to review and analyze these types of land use applications, in a manner far beyond what Congress intended. As set forth more fully below, Fairfax County respectfully requests that the FCC refrain from any rule making at this time; to the extent that any such rules are nonetheless issued, Fairfax County respectfully requests that the FCC do so in such a manner that preserves the ability of local governments to control these vital land use decisions to the maximum extent possible. In addition, the County asks the FCC to refrain from reexamining the 2009 Declaratory Ruling regarding the establishment of presumptive timeframes for the processing of wireless tower and antenna siting requests. *See 2009 Declaratory Ruling,*

[1] The statute defines an "eligible facilities request" as a collocation or the removal or repair of existing equipment. *See* § 6409(a)(2). For simplicity, the term "collocation" herein will refer to all such applications.

24 FCC Rcd 13994 (2009), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff'd sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd* 133 S.Ct. 1863 (2013).

BACKGROUND

In Fairfax County, and indeed in all of Virginia, land use review for telecommunication facilities is a simple process governed by state law and the Fairfax County Zoning Ordinance ("Zoning Ordinance"). Va. Code Ann. §15.2-2232 (2012) ensures that the location, character, and extent of certain public features such as streets, parks, and utilities, including telecommunications facilities, occurs within a comprehensive plan and framework. In Fairfax County, this plan is adopted by a commission specifically appointed for this purpose, and it is a long-term planning guide that represents the culmination of the community's review and analysis. *See generally, The Fairfax County Comprehensive Plan*; www.fairfaxcounty.gov/dpz/comprehensiveplan ("Comprehensive Plan"). As telecommunications applications are received, they are reviewed to determine whether they comport with this Comprehensive Plan—a process generally referred to as a "2232 Review."

In Fairfax County, with the exception of cellular towers,[2] telecommunications facilities are permitted by-right in all commercial and industrial districts, in any zoning district within a utility transmission easement with a width of 90 feet or more, and on all real property zoned to a public use. Zoning Ordinance § 2-514(4). In certain circumstances, antennas may also be established by-right in residential districts. Moreover, the 2232 Review process for collocations is even more straightforward because, without exception, the original telecommunications facility has already gone through the 2232 Review. Thus, unless a collocation application

[2] Cellular towers are allowed by right in Fairfax County in all industrial zoning districts and by special exception in all other zoning districts. *See* The Zoning Ordinance for the County of Fairfax, Virginia ("Zoning Ordinance") § 2-514(4); www.fairfaxcounty.gov/zoning.

reveals a new feature that would dramatically alter or change an existing telecommunications facility, there is typically little basis for a collocation application to require more formal review. In these instances, such requests are summarily approved without a public hearing by the Fairfax County Planning Commission as a "feature shown" on the Comprehensive Plan.

Moreover, even if further review is warranted, it is important to note that any such collocation application is already subject to stringent deadlines set forth in Va. Code Ann. § 15.2-2232(F), which states that the failure of a planning commission to act on any application for a telecommunication facility within 90 days of submission shall be deemed approval of the application, unless the governing body has authorized an extension of time for consideration (which may not exceed a period of 60 days), or the applicant has agreed to an extension of time. Fairfax County has strictly adhered to these deadlines in processing 2232 review applications for telecommunications facilities.

In rare situations, a collocation application in Fairfax County might be subject to a second land use approval process, a special exception application. Special exception approval is a legislative act by the County's Board of Supervisors reserved for uses that "by their nature or design can have an undue impact upon or be incompatible with other uses of land." *See* Zoning Ordinance § 9-001; www.fairfaxcounty.gov/zoning. Here § 6409(a), falls squarely within this "undue impact" and incompatibility context because it expressly allows localities to continue reviewing and analyzing certain existing facilities when they "substantially change the physical dimensions" of those facilities. Moreover, the FCC's concerns that leaving such threshold determinations to localities disrupts the expeditious deployment of telecommunications infrastructure is misplaced. As set forth more fully below, there is no evidence of any such recalcitrance in Fairfax County. The FCC's attempts to interpret § 6409(a) in a manner that

would prohibit or truncate local review and approval of such applications are not only unnecessary, they are beyond the intent and will of Congress.

I. THE FCC SHOULD REFRAIN FROM RULEMAKING BECAUSE LOCAL OFFICIALS AND ADMINISTRATORS ARE BEST SUITED TO DETERMINE WHETHER A COLLOCATION REQUEST SUBSTANTIALLY CHANGES THE PHYSICAL DIMENSIONS OF A TOWER OR BASE STATION.

Fairfax County has a well-established policy and practice of encouraging and approving the collocation of telecommunications facilities on existing wireless towers and base stations.[3] Fairfax County recognizes the value of such collocations both to improve the efficacy of wireless networks as well as part of sound land use policy, and indeed, the intent and purpose of § 6409(a) underscores these priorities and values. The FCC's proposed rules, however, appear to go way beyond the directive of § 6409(a). Many of the FCC's proposed rules extend the scope of § 6409(a) beyond Congress's original intent, and worse, misread the clear and unambiguous language of this statute.

Equally troublesome is the fact that the FCC's proposed rules would essentially eliminate sound and reasoned land use determinations when it comes to the siting and expansion of telecommunications facilities. At the core of solid land use planning is the recognition that most uses cannot be evaluated in a one-size-fits-all or cookie-cutter approach. Land and the uses to which it is put are inherently unique. Reasoned land use planning takes into account a myriad of

[3] Over the past five years (January 1, 2009 – December 31, 2013), Fairfax County has accepted 622 applications either to collocate telecommunications equipment on existing towers and base stations, or to install such equipment on other existing structures such as rooftops, electrical utility poles, and water storage facilities. The County has approved 621 of these requests, an astonishing 99.8%. Moreover, the Comprehensive Plan expressly provides that locating proposed telecommunication facilities on available existing structures is a preferable policy objective over the construction of new facilities. The Comprehensive Plan, Objective 42, Policy; www.fairfaxcounty.gov/dpz/comprehensiveplan. A copy of this section of the Fairfax County Comprehensive Plan is attached hereto as Exhibit A.

factors and interests including the nature and character of the site and its surrounding property, its proximity to various natural resources, its topography, and historical resources among countless others. The benefit of local land use planning and decision-making is that local governing bodies, planners, and administrators—rather than remote federal regulators— are best suited to make individualized determinations that reconcile all of the competing interests and needs posed by a land use application. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). As the Fourth Circuit has stated,

> '[Z]oning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' . . . We can conceive of few matters of public concern more substantial than zoning and land use laws.

Pomponio v. Fauquier Cnty. Bd. of Supervisors, 21 F.3d 1319, 1327 (4th Cir. 1994) (quoting *Village of Belle Terre v. Boraas,* 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)). Likewise, the Supreme Court of Virginia has recognized that the members of a local legislative body are in the most advantageous position to determine the proper uses of land within their jurisdiction. *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 423-424, 281 S.E.2d 836, 841 (1981).

To be sure, § 6409(a) has already significantly constrained a locality's ability to make such reasoned decisions when it comes to certain applications. The constraint of § 6409(a), however, is limited: it applies to only (i) wireless towers and base stations, (ii) that already exist, and (iii) that do not substantially change the physical dimension of these structures. The FCC's attempt to extend further a carefully limited directive serves only to eliminate the remaining discretion that Congress left to localities. To the extent that § 6409(a) has left any issues undefined, the public interest is better served by allowing localities to weigh in on those issues

on a case-by-case basis rather than to steamroll uniform rules that simply will not fit every situation.

The FCC's rationale for jumping into this arena, namely, to prevent protracted litigation and any delays in "the timely deployment of a nationwide public safety network . . . and other communications services" is laudable, but ultimately misguided. *See* NPRM, ¶ 97. First, it assumes without any real data that localities thwart collocation requests, whereas at least in Fairfax County, that assumption is wholly incorrect. In the last five years, Fairfax County has approved 99.8 % of all such applications. Indeed, Fairfax County has a long and proud record of working with the telecommunications industry to place telecommunications facilities in areas where they can be properly integrated into the community. *See T-Mobile Northeast LLC v. Fairfax Cnty. Bd. of Supervisors,* 672 F.3d 259, 269 (4th Cir. 2012) (observing that Fairfax County "has a strong history of approving wireless facilities"). Indeed, in those rare instances when accord has not been achieved, it would seem to be the result of over-reaching by the industry rather than recalcitrance by Fairfax County. *See New Cingular Wireless v. Fairfax Cnty. Bd. of Supervisors,* 674 F.3d 270, 277 (4th Cir. 2012) (upholding the County's denial of an 88-foot-tall telecommunications tower in a residential district).[4]

Second, any purported benefits to be derived from predictability do not outweigh the very real harms that will result as telecommunications facilities wholly incongruous with a community or a location begin to populate the landscape. Despite the FCC's statement that it does not intend to function as a "national zoning board," the proposed rules raise that very specter. *See* NPRM, ¶ 99. Finally, any "rule" that short-circuits the local administrative or

[4] It should be noted that this denial fell outside of the five year window noted above. Still, in the past 30 years, out of literally thousands of applications, the County has denied only 12 monopole requests and 5 collocation applications.

legislative process serves only to disenfranchise citizens. Local governmental officials are ultimately accountable to the citizens of their community; replacing that accountability with inflexible rules crafted by people unfamiliar with a community is simply undemocratic. Fairfax County respectfully urges the FCC to refrain from any proposed rulemaking at this time.

II. THE FCC'S PROPOSED DEFINITIONS OF SECTION 6409(a)'S TERMS ARE TOO EXPANSIVE AND UNWORKABLE.

A. Back-Up Generators Should Not Be Included Within the Definition of "Transmission Equipment."

Fairfax County does not have any substantial concern with a definition of "transmission equipment" that does not distinguish generic telecommunications services from personal wireless services. Indeed, the Zoning Ordinance treats all telecommunications services the same.

Fairfax County is particularly concerned, however, if back-up generators are included within the definition of "transmission equipment" such that local review of this equipment is truncated. Although the Zoning Ordinance includes backup generators as part of the telecommunication facility's cabinet compound, encompassing them within the ambit of § 6409(a) would be misguided. Back-up generators, in particular, have certain features that warrant careful review. This equipment is necessarily accompanied by fuel tanks containing flammable materials. When it operates, it produces noxious fumes. Back-up generators are loud. Moreover, the frequent siting of telecommunications facilities in public areas — schools, parks, and other public lands — makes these issues a real matter of public safety.

For example, collocations at schools utilize stadium and athletic field lighting poles for the placement of antennas. This, in turn, potentially places equipment cabinets and backup generators in close proximity to students, stadium seating, and crowds. As part of Fairfax County's review process, backup generators and fuel tanks require a permit application

submitted to the County's Office of the Fire Marshal to ensure compliance with applicable fire codes. Adding or replacing a back-up generator might not necessarily equate to a substantial change in the physical dimension as required by § 6409(a), but to ignore such critical safety issues under the banner of expeditious review would be foolhardy.

B. The Definitions of "Existing Wireless Tower or Base Station" Should be Limited to Only Those Structures Whose Sole or Primary Purpose is for Telecommunications Services.

The FCC's intention to define "wireless tower or base station" to include any structures that support or house an antenna, transceiver, or other associated equipment regardless of whether those structures sole or primary purpose is for telecommunications services is problematic. First, the FCC's proposed interpretation would twist these terms in ways that belie their common sense meaning. Even under the expansion of agency authority recently articulated by the United States Supreme Court, an agency "must give effect to the unambiguously expressed intent of Congress." *See City of Arlington v. Fed. Commc'n Comm'n*, 133 S.Ct. 1863, 1874 (2013) (opining that "[w]here Congress has established a clear line, the agency cannot go beyond it"). Although the FCC claims that its interpretation of "wireless tower or base station" is consistent with rules of statutory construction that would give separate meaning to each of these terms, that rule is not required when each of these terms is unambiguous on the face of the statute. *See id.* at 1868 (when "Congress has directly spoken to the precise question at issue . . . that is the end of the matter"). A "wireless tower" is not a utility pole, a streetlight, or a building. A "base station" is not "any" telecommunications equipment in "any technological configuration;" it is not a distributed antenna system ("DAS"). Rather, a "base station" is precisely what those words connote—discrete set of components that directly support the telecommunications of a wireless tower—at its "base."

The FCC would do well to be mindful of the law of unintended consequences. In an effort to interpret these terms expansively, the proposed rules could thwart other creative zoning solutions and actually discourage the placement and collocation of telecommunications facilities. For example, Fairfax County supports the location of telecommunication facilities on the rooftops of multi-story structures. *See* Zoning Ordinance § 2-514(1)(A) (permitting structure and rooftop mounted antennas, with related equipment by right on multiple family dwellings greater than 35 feet in height, in all commercial and industrial districts, and all buildings owned or controlled by a public use, among others). An FCC rule, however, that would apply § 6409(a) to permit the unlimited placement of rooftop antenna and equipment runs the real risk of crowding out other important rooftop uses such as elevator shafts and HVAC equipment. *See* Zoning Ordinance § 2-506 (providing that rooftop structures that comprise more than 25% of the rooftop surface must be included in building height calculations).

In addition, to the extent that rooftops are interpreted as "base stations" creative zoning is similarly compromised: less physical space exists for gardens, pools, and other "green" development, or using rooftops in a way that promotes urbanization and mixed-use development uses such as restaurants or recreational space. Instead, the FCC's rule runs the risk of creating unfettered jungles of telecommunications equipment on rooftops such that Fairfax County would be wise to simply discourage the placement of telecommunications facilities on rooftops altogether. The discretion to develop creative solutions for individual cases, on the other hand, would encourage the use of rooftop spaces for telecommunications equipment when and as appropriate.

C. The Terms "Collocation," "Removal," and "Replacement" Necessarily Mean That Telecommunications Equipment is Already Present.

Section 6409(a) is a directive to localities that "a *modification* of an *existing* wireless tower or base station that does not substantially change the physical dimensions of such tower or base station" must be approved. (Emphasis added.) Again, this language is clear and unambiguous. If "existing" is to have any meaning, it has to connote telecommunications equipment that is already in existence. It is simply Orwellian to argue that structures that do not currently house telecommunications equipment should also be included within the ambit of rules interpreting § 6409(a). *See* NPRM ¶ 111. Moreover, any assertion to the contrary flatly ignores the term "modification" in § 6409(a). If the structure at issue does not yet house telecommunications equipment, there is nothing to "modify." Similarly, any definition of "collocation" that does not also recognize already existing telecommunications equipment belies any common sense interpretation of this word because to "collocate" necessarily means to add equipment where it already exists. Similarly, a "repair" or "replacement" both require existing equipment in order to have any meaning. In short, there cannot be a "collocation," a "repair," "a replacement," or a "modification" if there is nothing there in the first place.

D. Whether a Collocation "Substantially Change[s] The Physical Dimensions" of a Tower or Base Station Cannot be Determined via Uniform Rules.

The most alarming of the FCC's proposed rules is the stated proposal to adopt the same four prong test as in the *2009 Declaratory Ruling*. *See* NPRM ¶ 118. Whether a collocation would "substantially change the physical dimensions" of a telecommunications facility is by its very nature a question that can only be analyzed on a case-by-case basis, and Congress recognized this fact when it exempted such application requests from the parameters of § 6409(a). Not only do the proposed rules deny local and state governments this review, as

illustrated below, each of the four tests is simply unworkable. Indeed, in any situation where the original tower or base station was designed with certain features or conditions that would ensure its compatibly with the surrounding community, the uniform proposed rules would frequently transform an unobtrusive use into one that nonetheless "substantially changes the physical dimensions" of those structures.

For example, the first rule, which would permit any increase of either 20 feet or 10% of the existing height, whichever is greater, completely negates any benefit of limiting tower height to the existing tree line or building line. It would also render camouflage techniques such as tree-poles as superfluous; towers and poles designed to look like trees are only effective when those features blend in with the tree canopy. In the illustration below, the antenna array in the first photo, albeit not perfectly blended with the tree line, will likely achieve that result in the near future as trees grow; the second illustration, a rendering that depicts just one additional layer of antenna, is much more noticeable, defeating the purpose of the camouflage technique altogether.

Similarly, towers that are permitted to install up to four additional equipment cabinets or antenna that are permitted to protrude up to twenty feet from the edge of the tower obliterates the stealth appearance of some towers, or may simply look top-heavy and unwieldy. In addition,

permitting any excavation within the boundaries of the site that hosts a tower or base station essentially eliminates any requirement for buffering or transitional screening. As shown below, even an attempt to maintain screening can have an unacceptable result:

Indeed, in the illustration above, an increase in the base station of such a few additional feet might also eliminate the existing vegetative screening on the far right of each photo, impede safe access around the building, and likely cause an adverse impact on the stormwater feature in the foreground. As made clear by these illustrations, whether a collocation, removal, or replacement will "substantially change the physical dimensions" of the existing tower or base station is not a decision amenable to uniform rules. Land use decisions are necessarily as varied as the underlying land itself. It is simply impossible to craft rules that will apply in every situation. This conclusion, as noted in the NPRM, is shared by the Intergovernmenal Advisory Committee ("IAC"), and accordingly, Fairfax County fully endorses the IAC's views in this regard. *See* NPRM ¶ 122.

Although Fairfax County does not support any rule that would permit a *per se* increase of 10%, the suggestion that such 10% increases in height should not be measured from the height of the original structure but rather that multiple and successive increases would be permitted is truly

untenable. *See* NPRM ¶ 120. As noted in the NPRM, any such rule would permit the height of a tower or base station to be increased *ad infinitum.* If "substantial change" is to have any meaning, the baseline must be the structure's original dimensions and not the cumulative point of all prior modifications. Any rule to the contrary will have the result that local and state governments will be loath to approve any new structure because once they do so, they effectively lose all control over its subsequent growth.

III. SECTION 6409(a) DOES NOT OBVIATE INDUSTRY OBLIGATIONS TO SUBMIT FORMAL APPLICATIONS FOR COLLOCATION APPROVAL, NEGATE A LOCALITY'S ABILITY TO IMPOSE CONDITIONS ON SUCH AN APPLICATION, OR IMPOSE ANY TIME LIMITATIONS ON SUCH REVIEW.

The language "may not deny and shall approve" language in § 6409(a) is expressly limited to only those collocation requests that do not "substantially change the physical dimensions" of a tower or base station. It is not a discretionless mandate, but rather, requires an analysis of whether the structure at issue will be "substantially change[d]." Given that approval hinges on this inquiry, the next question is what process is best for analyzing that question. As set forth above, that inquiry is best left to local officials who have a better understanding of the facts and circumstances of each such application. Even if, however, uniform rules are promulgated to control this inquiry, a review process as to whether those rules should apply in a given application must still occur. In short, there is nothing in § 6409(a) that negates the necessity of at least some local or state review of collocation requests. As set forth more fully below, the FCC's attempt via rulemaking to limit local review beyond the restrictions expressly authorized by § 6409(a) cannot be countenanced.

A. There are Many Instances When Even Minor Changes to a Telecommunications Facility Should Still Not Be Approved.

There are several situations when even a collocation that does not substantially change the physical dimension of a tower or base station must nonetheless be denied. First, implicit in § 6409(a) is that the existing telecommunications facility was lawfully installed. There is nothing in the language of § 6409(a) that would sanitize the unlawful construction or installation of telecommunications facilities. Moreover, even when a telecommunications facility is a lawfully nonconforming use, a telecommunications provider should not be permitted to exacerbate that nonconformity by resorting to § 6409(a). *City of Emporia Bd. of Zoning Appeals v. Mangum*, 263 Va. 38, 43, 556 S.E.2d 779, 782 (2002) (noting that "[n]onconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan.") (Citations omitted.) When a telecommunications facility is already contrary to a locality's zoning ordinance or plan it is very likely that an increase in that nonconformity is per se a substantial change.

Similarly, there are also certain instances in which the original telecommunications facility was approved subject to certain conditions or within a clearly defined building envelope, such as, for example, a maximum height limitation or square footage foot print. In addition, there are times when a carrier agrees to provide a stealth structure or install screening to minimize impacts to adjacent properties. Modifications to an existing tower or base station should be required to maintain the integrity of the original approval and these previously approved conditions. Sometimes that may be impossible, and hence a denial will be warranted. Other times, of course, an application may be approved if the telecommunications provider adds certain additional other features, or refrains from certain minor changes. The imposition of such conditions cannot be construed as running afoul of § 6409(a). An approval with some conditions

is still an approval, and nothing in § 6409(a) supports a contrary interpretation. To be sure, if § 6409(a) is to be interpreted such that collocations can violate existing conditions, or local and state governments are prohibited from imposing conditions to ensure that any changes maintain the integrity of the original approval, it is quite likely that these entities will be loath to approve original siting requests—a result that will thwart the very purpose for which § 6409(a) was originally enacted.

Second, and critically, § 6409(a) is a constraint on land use decisions; it does not in any way serve to preempt building codes, fire codes, or other such codes that are designed to protect public safety. Height increases and the weight of additional antennas and equipment could necessitate a different structural design than one requested to prevent structural failure. It is simply absurd to support any interpretation of § 6409(a) that would allow the installation or construction of unsafe structures. *See Cuccinelli v. Rector, Visitors of Univ. of Virginia*, 283 Va. 420, 436, 722 S.E.2d 626, 635 (2012) (setting forth the well-settled rule of statutory construction that a statute "should never be construed in a way that leads to absurd results.") Moreover, even if one were to argue that § 6409(a) applies to safety codes, the statute implicitly recognizes that any change in a telecommunications tower or base station that would render it unsafe is necessarily "substantial."

B. Section 6409(a) does not Apply When a Government is Acting in a Proprietary Capacity.

It is also important to observe that § 6409(a) only applies to governments when they are acting in a land use capacity, and not in a proprietary capacity. Although in Fairfax County telecommunications facilities are allowed by right on public uses, that is still a far cry from an interpretation of § 6409(a) that would preclude governments from negotiating the business aspects of such facilities like the amount of rent paid, the location of the structure, and the

duration of any tenancy or license. That the Telecommunications Act does not apply to governments acting in a proprietary capacity was recently recognized by the Ninth Circuit. *See Omnipoint Communications, Inc. v. City of Huntington Beach,* Nos. 10-56877, 10-56944, U.S. App., WL 6486240 *8 (9th Cir. 2013) (holding that § 332(c)(7) of the Telecommunications Act "applies only to local zoning and land use decision and does not address a municipality's property rights as a landowner.") Thus, the courts concur with the IAC's conclusion that when a government is acting as a landlord rather than as a regulator, § 6409(a) is not applicable. *See* NPRM ¶ 129. Fairfax County strongly endorses this interpretation and urges the FCC to accept it.

C. Section 6409(a) Does Not Preclude a Requirement for the Submission of an Application for a Collocation Request.

As the FCC correctly observes, the use of the term "approve" in § 6409(a) necessarily connotes an application process. *See* NPRM ¶ 131. In Fairfax County, this application includes basic information regarding the location of the structure, a description of proposed equipment, its land use impacts, and the necessity of the facility. It requires the minimum amount of information necessary to make a rationale and informed decision about an application. *See* attached hereto as Exhibit B a copy of the Fairfax County Telecommunications Application. Tellingly, the County does not charge any fee for the processing and review of telecommunications applications—either initial installations or collocations despite the administrative costs associated with such review.

As noted above, the Virginia Code dictates that review of a telecommunications facility must be within 90 days of receipt of a completed application, and Fairfax County fully complies

with those requirements.[5] Va. Code Ann. § 15.2-2232(F) . It is important to observe, however, that reviews that take longer than this time frame are usually delayed by telecommunications providers because they fail to submit a properly *completed* application. Despite the fact that the Fairfax County telecommunication form has been in existence for almost ten years, telecommunications providers routinely submit incomplete or inaccurate applications. Generally, nearly all applications contain some type of error and approximately 25% of applications require a resubmission. Typical errors include miscalculation of equipment cabinets and antenna size, discrepancies between the application and submitted plans, errors in tax map numbers, and incomplete information related to the proposed action. Other errors include deficiencies such as incorrect addresses, incorrect land use information such as the applicable zoning and other prior approvals, and missing photo simulations. It is critical, therefore, if the FCC is contemplating any time parameters for the review of collocation requests, that this fact be taken into consideration, and that any time limitations be calculated from the time that a *completed* application is submitted.[6]

D. Nothing in Section 6409(a) Requires an Administrative Process to the Exclusion of a Legislative Process.

Nothing in § 6409(a) precludes the necessity of a legislative process to review collocation applications. To be sure, Fairfax County is sensitive to the issue of expediting collocation

[5] In the 5-year period from January 1, 2009 through December 31, 2013, Fairfax County accepted 648 Telecommunication applications, of which 622 (96%) were reviewed under Administrative review guidelines that did not require a public hearing. Moreover, of these administrative approvals, 83% were reviewed and approved within 90-days, 12% were reviewed and approved within 150-days, and only 5% required longer than 150 days.

[6] In addition, even if the FCC were to impose a rule that mandated a particular time period for review, there is no reason to prevent the applicant and the locality from agreeing to extend that time frame. Any such requirement would seem to serve neither party's interest if they are both amenable to such an agreed-upon extension.

applications, and to that end, it recently adopted amendments to the Comprehensive Plan's Telecommunication Policy Plan to streamline the administrative review of collocations. This Plan provides that certain collocations which otherwise meet the zoning ordinance requirements and comport with the plan's guidelines are eligible for either an Administrative Review approval (by staff) or a Feature Shown determination by the Planning Commission without a public hearing. *See generally*, The Fairfax County Comprehensive Plan, Mobile and Land-based Telecommunication Services, Objectives 44 and 45. A copy of this section of the Comprehensive Plan is attached hereto as Exhibit A. For example, installations on existing structures such as water towers and buildings can be administratively deemed as a "feature shown." *See id.* Objective 44, Policy a and b. These policies and the liberal treatment that such applications receive in Fairfax County underscore that there is simply no need for the FCC to enter this arena. Local governments who are behaving responsibly, in a manner that ensures that important land use interests are not ignored need no such further regulation.

Some applications benefit from the legislative process, whereby a public hearing is held. Although it is rare for a proposed collocation to trigger a public hearing, in Fairfax County that option exists at the discretion of the Planning Commission and can be an important planning tool. Indeed, in those infrequent collocations when the physical dimensions of the existing facility will be significantly impacted, a legislative process, that includes a public hearing, and as such, notice and comment from the public is preferable to an administrative process.

E. Any "Deemed Approved" Remedy is Constrained by the Tenth Amendment.

The enforcement remedies to be employed with regard to § 6409(a), particularly any rule in which applications would be "deemed approved" if they are not acted upon within a given time frame, create issues that overlap almost completely with the same issues that the FCC is

considering with respect to § 337(c)(7). As such, they will be dealt with more fully below. Nonetheless, and pursuant to the FCC's invitation for such comment, some discussion is warranted here as to the implications of any such rule with the Tenth Amendment. *See* NPRM ¶ 138.

Congress's power to regulate interstate commerce is limited by the principles of federalism expressed in the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Finding that Section 332(c)(7) of the Telecommunications Act imposes federally mandated standards on state and local government's legislative processes and intrudes on their traditional authority to zone property, at least one federal circuit court judge has found that the substantial evidence standard in Section 332(c)(7) of the Telecommunications Act violates the Tenth Amendment. *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688, 705 (4th Cir. 2000) (Niemeyer, J., concurring in part and dissenting in part). The more broadly § 6409(a) is interpreted, the more it intrudes on the traditional authority of state and local governments to zone property, which in turn increases the likelihood that § 6409(a) will be found to violate the Tenth Amendment. *See generally* John R. Pestle, *Section 6409(a) of the Middle Class Tax Relief Act is Unconstitutional,* Municipal Lawyer, Sept.-Dec. 2012, at 22. The FCC is urged to circumscribe its proposed reading of § 6409(a) to avoid unnecessary federal intrusion into state and local governments' longstanding zoning authority, which will in turn diminish the likelihood of constitutional challenges to FCC's proposed rulemaking and the federal statute.

IV. THE FCC NEED NOT REVISIT ITS PRIOR INTERPRETATIONS UNDER SECTION 337(c)(7).

As the FCC recognizes in the NPRM, Congress expressly preserved State and local zoning authority over the siting of telecommunications facilities as part of § 332(c)(7) of the

Telecommunications Act of 1996 ("Act"). This authority was limited only by the restrictions and requirements in the Act providing that (1) any denial must be supported by substantial evidence; (2) the zoning decision must not discriminate among functionally equivalent carriers; (3) the decision should not have the effect of prohibiting personal wireless services; (4) zoning authorities may not regulate based on adverse health effects as long as the emissions comply with FCC standards; and (5) local governments must act on telecommunications facility siting applications within a reasonable period of time. The remedy for an alleged violation of these provisions was expressly stated by Congress as part of the Telecommunications Act. Section 332(c)(7)(B)(ii) plainly states that any person aggrieved by any state or local government's final action or failure to act "may, within 30 days after such action or failure to act, commence an action in a court of competent jurisdiction."

In 2009, in response to a petition by a trade association of wireless service providers, CTIA – The Wireless Association, the FCC promulgated the Declaratory Ruling in FCC 09-99 ("Declaratory Ruling" or, more colloquially, the "Shot Clock Ruling"), which established certain presumptively reasonable timeframes for zoning authorities to act on telecommunications facilities applications. In its Declaratory Ruling, the FCC openly acknowledged that the courts are the ultimate arbiter of whether a zoning authority has acted on a zoning application within a reasonable period of time, and the FCC sought only to establish presumptive timeframes for such action, which could be rebutted or explained in a court of law. (Declar. Ruling, ¶ 39.) In the currently pending NPRM, the FCC categorically notes that it does not intend to change any of these determinations, writing, "[w]e do not intend in this Notice to seek comment on or otherwise revisit any aspect of our 2009 Declaratory Ruling." (NPRM, ¶ 152.)

Paradoxically, the NPRM then turns to positing several questions about § 332(c)(7) that do precisely what the FCC said it was not going to do – question the findings in the Declaratory Ruling. Critically, one such question asks whether the FCC correctly decided in the 2009 Declaratory Ruling that applications should not be "deemed approved" if the presumptive timeframes were not met. (NPRM, ¶ 162.) The FCC itself provided a very compelling argument as to why the "deemed granted" remedy was inappropriate in 2009, and the logic continues to hold true today. Likewise, the FCC does not need to reexamine the criteria for determining when an application is complete for purposes of triggering the presumptive timeframes for action. (NPRM, ¶ 154.) For the reasons that follow, the FCC should decline the industry's invitation to engage in further rulemaking regarding the issues addressed in the Declaratory Ruling.

A. As the FCC Has Stated, Applications Should Not Be Deemed Approved.

In its 2009 Declaratory Ruling, the FCC determined that 90 days was a presumptively reasonable amount of time to act on an application for a collocation, and 150 days was presumptively reasonable for all other applications. As part of the Declaratory Ruling, the FCC expressly rejected the industry's request for a "deemed approved" provision, which would hold that applications not acted on within the presumptive timeframes were "deemed approved." As part of its 2009 Declaratory Ruling, the FCC explicitly stated:

> We reject the Petitioner's proposals that we go further and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court will hear and decide such action on an expedited basis." This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.

(Declar. Ruling, ¶ 39.) Thus, because Congress has already determined that disputes arising under the Telecommunications Act should be decided by the courts, the FCC is without authority

to modify that provision by adopting a "deemed approved" remedy for applications that are decided outside the presumptively reasonable timeframes.

In addition, if the FCC hypothetically adopted such a "deemed approved" remedy, it would run directly afoul of the United States Supreme Court's decision in *City of Arlington, Texas v. Federal Commc'n Comm'n*, 133 S.Ct. 1863 (2013) because it would be acting outside the congressionally mandated limits of its authority. In *City of Arlington,* the Supreme Court held that the fundamental question in examining actions by the FCC is "always whether the agency has gone beyond what Congress has permitted it to do." 133 S.Ct. at 1869. If the FCC, disregarding its own prior admissions about the limits of its authority, nevertheless adopted a "deemed approved" remedy that precluded the courts from exercising the authority that was explicitly conferred on the judiciary by Congress in the Telecommunications Act, it clearly would go "beyond what Congress has permitted it to do" in contravention of the Supreme Court's holding in *City of Arlington, Texas.*

Further, as the FCC also noted in the Declaratory Ruling, "the case law does not establish that an injunction granting the application is always or presumptively appropriate when a failure to act occurs." (Declar. Ruling, ¶ 39.) The FCC further noted that courts correctly examine all of the facts before determining what remedy is appropriate for a failure to timely act on a zoning application for a telecommunications facility. *Id.* In several reported decisions, for example, the federal district courts noted that the delay beyond statutorily mandated timeframes was entirely defensible. *See, e.g., Sprint Spectrum, L.P. v. Zoning Hearing Bd. of Williston Township,* 43 F. Supp. 2d 534, 539 (E.D. Pa. 1999); *Atlantic Richfield Co. v. City of Bethlehem,* 450 A.2d 248, 252 n.4 (1982); *New York SMSA Ltd. P'ship v. Town of Riverhead Town Bd.,* 118 F. Supp. 2d 333 (E.D.N.Y. 2000). Indeed, the FCC stated that "[i]t is important for courts to

consider the specific facts of individual applications and adopt remedies based on those facts." (Declar. Ruling, ¶ 39.)

Notwithstanding the clarity of the FCC's pronouncements and its categorical statement that it does not intend to revisit any part of the Declaratory Ruling, it appears that the PCIA and DAS Forum comments nevertheless ask the FCC to deem applications approved that do not comply with the presumptive timeframes. For the reasons articulated by the FCC in its own 2009 Declaratory Ruling, such requests should be rejected. Congress has explicitly stated that disputes under the Telecommunications Act must be resolved by the courts, on an expedited basis after a review of all of the facts of a particular case. Imposing a "deemed approved" standard would run afoul of this explicit Congressional direction and cause the FCC to act outside of its statutorily defined authority.

B. "Collocation" is Not Susceptible to Various Definitions.

The FCC also asks whether the term "collocation" should be defined in the same manner for purposes of the 2009 Declaratory Ruling and Section 6409(a) of the Spectrum Act. (NPRM, ¶ 113.) Specifically, the FCC appears to be inclined to impose a definition of "collocation" found in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, App. B, in both contexts. However, as noted above, the definition considered by the FCC extends well beyond any commonly understood parameters of the term "collocation." The term, in ordinary parlance, means the installation of additional antennas on an existing wireless facility with one or more existing antennas, with no substantial change in the existing facility's physical dimensions. It is only through distending the plain meaning of the word to potentially include 10 percent increases in height and substantial increases in width that the FCC creates the dilemma in which it finds itself of defining how far the definition actually

extends. Adherence to the plain meaning of the word eliminates these dilemmas and adheres to the intent of Congress expressed in § 6409(a). Accordingly, the County again urges the FCC not to delve into a rulemaking exercise that imposes an artificial reading of the word "collocation" on § 6409(a) and stretches the Act far beyond any sensible reading. Likewise, such an artificial reading should not be superimposed on the Declaratory Ruling.

C. Only a Complete Application Should Trigger the Presumptive Timeframe.

As noted, above, it is the County's unfortunate experience that wireless service providers frequently submit applications that are woefully short of complete or fully thought out, such that they do not represent a cogent or consistent representation of the proposed improvement. Without such information, it is simply impossible to engage in any meaningful review of a zoning application. At that point, County staff will attempt to engage the carrier in a dialogue, which the carrier may or may not be interested in having in an expedited timeframe, depending on that carrier's priorities and the level of its staffing. County staff, for example, experiences problems in maintaining a reliable and consistent contact person with the carrier, who is familiar with the specific application that has been presented to staff. Similarly, requests for information from the carrier are not always timely answered. Drawings are often re-submitted that contain the same errors and omissions. In other words, until the wireless carrier has fully formed its proposal and committed to pursuing it, it is impossible for County staff to do the work for the carrier.

Clearly, the shot clock should not be running during these exasperating delays, caused entirely by the carrier. Indeed, rewarding these delays, errors, and omissions with a "deemed approved" remedy or expectation of a presumptive time frame due to its own delays would simply encourage providers to submit incomplete applications and wait for the clock to expire,

without providing localities with the information needed to make an informed zoning decision, culminating in a "gotcha" moment where the local government is deemed to have approved the application based on the expiration of an artificial clock. Such a nonsensical outcome would significantly limit local review of these applications. Based on the FCC's unfamiliarity with the particularities of a myriad of different local zoning practices, it is unwise to attempt to establish any hard and fast rules for determining when an application is complete, beyond what the FCC has previously stated. While the County encourages the FCC not to act in this regard, if it does act, the standard for completeness should be defined as the time when the carrier has provided to the zoning authority all information necessary for the state or local government to perform its zoning review of the application at issue, as set forth in the locality's standard application for such facilities.

D. Local Moratoria on Applications does not Occur in Fairfax County.

The FCC notes that some localities have adopted local moratoria against zoning applications for telecommunications facilities for periods of up to six months or more, and the FCC proposes to find that the presumptive timeframes continue to run during any such moratorium period. (NPRM, ¶¶ 155-157.) As further evidence of the lack of any need to regulate vis-à-vis Fairfax County, the County has never enacted any sort of moratorium on the processing of telecommunications facility siting applications. Instead, as previously noted, Fairfax County has a strong record of approving applications, and many staff hours are devoted to ensuring that applications for telecommunications facilities are processed with all due speed and in accordance with all applicable requirements. Accordingly, FCC rulemaking in this regard is neither warranted nor necessary with respect to Fairfax County.

E. A Preference for Municipal Property is not in any Sense Discriminatory.

The test for discrimination under § 332(B)(i)(I) of the Telecommunications Act is whether a locality has preferred one functionally equivalent provider over another. *See, e.g., T-Mobile Northeast, LLC v. Bd. of Supervisors,* 672 F.3d 259, 270 (4th Cir. 2012) (holding that the discrimination clause in the Telecommunications Act proscribes unreasonable discrimination against carriers who provide the same type of wireless service). For example, the issue, when such a discrimination claim is alleged in a complaint, is whether the locality permitted AT&T to erect a particular facility, but denied the same right to T-Mobile for no apparent reason. *Id.*

Notwithstanding the clearly stated framework of a discrimination claim under the Telecommunications Act, PCIA asks the FCC to find that local ordinances establishing preferences for placement of telecommunications facilities on municipal property somehow are the equivalent of discriminating against functionally equivalent carriers. Clearly, they are not. Such a preference plainly does not discriminate among functionally equivalent providers because these policies, where they exist, apply to *all* telecommunications carriers. In other words, AT&T *and* T-Mobile will both be asked to first examine public lands as an option before turning to private property as a potential site. Neither competitor has an advantage over the other when it comes to such a preference because they are treated precisely the same under the preference. Thus, the existence of such a preference is not at all akin to the impermissible discrimination that results when AT&T is permitted to have its facilities, but its competitor T-Mobile is precluded from doing so for no apparent reason.

Although the foregoing analysis should dispose of this issue, it is also noted that local governments may legitimately state a preference for siting telecommunications facilities on public lands for many valid, land use based reasons. Significantly, public lands often include

expansive parks, tree cover, buffered areas, and open spaces where telecommunications facilities may best be camouflaged in a manner that diminishes their visual impact on the community. Further, publicly owned government buildings also permit extensive rooftop collocations, which often marry up publicly managed communications systems with commercial wireless service antennas. Likewise, a preference for location on public lands ensures the continuity of telecommunications facilities once constructed, in that public lands typically are not subject to changes of ownership in the same manner as private land. Facilities on public lands also tend to be better buffered from adjacent residential uses and serve a safety purpose of providing cell phone service in more remote, but utilized, parts of the County. For all of these reasons, the FCC should decline the industry's misguided invitation to engage in rulemaking in this area.

F. Application of the Abbreviated Timeframes to DAS Systems Would be Misguided Because These Facilities Often Require Particularized Review.

Distributed antenna systems (DAS) typically involve a substantial height increase to a number of existing utility poles, and that height increase typically exceeds the 10 percent of the height of the original utility pole. The DAS networks processed thus far in Fairfax County have involved multiple installations on multiple poles -- typically around 8 to 16 nodes or installations at a minimum for each network. Candidly, the County has found that wireless providers typically do not spend a great deal of time, in connection with their initial submission, on ensuring that they have chosen the least obtrusive location for these nodes. For example, in one such DAS submission to the County, installations were initially proposed that directly obstructed the view from residents' windows or, in one instance, that were squarely at the center of a residents' long-existing outdoor recreational space. Through the zoning process, the nodes that were contiguous to residents' windows were moved to other existing utility poles that were further removed from residences, and the node proposed for the center of the outdoor

recreational space was moved behind existing trees. Both DAS systems were ultimately approved as modified. Plainly, both the wireless provider and the community "won."

Because of the number of nodes proposed with DAS systems and the fact that they are not collocations under any definition of the term because of the substantial height increases, 90 days is too abbreviated a timeframe to allow for this collaborative process. However, such applications can be processed in the timeframes allowed for all other applications, or 150 days. To be sure, the County has not taken the position that expedited timeframes are optional when it comes to DAS systems. As noted above, the County already has timeframes imposed for its 2232 review, and those timeframes also apply to DAS systems. As a result, there is no need for rulemaking in this area as far as the County is concerned.

V. CONCLUSION.

Section 6409(a) is a departure from the manner in which collocation requests were reviewed and approved by local and state governments. This statute, however, is narrow in scope. It is only in the limited situation where a collocation request does not result in a substantial change in the physical dimension of an existing wireless tower or base station that regulatory control has been preempted. As set forth more fully above, however, many of the FCC's proposed rules go well beyond this narrow scope and would eliminate meaningful land use review altogether. Similarly, § 332(c)(7) of the Telecommunications Act expressly preserves local and state oversight of telecommunications installations, and although the FCC has issued presumptive guidelines for approving telecommunications applications, it has refrained from mandating any such time parameters. Nonetheless, the FCC is now contemplating new rules that would substantially curtail local land use review, which is usually the only balancing force to ensure that the installation of telecommunications infrastructure

comports with the character of its surroundings and is in harmony with the surrounding community.

This result was never the intent of Congress, and is particularly inappropriate in Fairfax County, which has a long history of collaborating in good faith with the telecommunications industry. Fairfax County respectfully requests that the FCC refrain from any rulemaking at this time, and to the extent that anything is promulgated, it be done in a manner that preserves local and state regulatory review to the maximum extent possible.

Respectfully submitted,

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